

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY HAROLD SMITH,

Defendant and Appellant.

E046416

(Super.Ct.No. FNE700069)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, and Gary W. Schons, Assistant Attorney General, for Plaintiff and Respondent.

INTRODUCTION

In this appeal, defendant and appellant Jeffrey Harold Smith argues that a six-year prison term imposed after he violated his probation was unauthorized, because although the trial court purported to “lift” a previous stay of execution, in fact, no sentence had ever been pronounced. In his related petition for writ of habeas corpus,¹ he raises essentially the same issue and also argues that the trial judge erroneously failed to recuse himself and indirectly denied him a “*Vickers* hearing”² with respect to the alleged probation violation.

As we discuss below, we find no reversible error and we will affirm the judgment.

STATEMENT OF FACTS

Defendant was charged with second degree burglary and receiving stolen property, both felonies. (Pen. Code, §§ 459, 496, subd. (a).)³ The complaint also alleged that defendant had been convicted of a serious or violent felony within the meaning of the three strikes law. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).)

Before a preliminary hearing could be held, defendant changed his plea to guilty as to count 2, receiving stolen property. He also agreed to admit the prior strike. Count 1 was dismissed. The change of plea form reflected that he agreed to enter this plea in return for the promise of a six-year suspended sentence with referral to drug court. This

¹ This court considered the petition for writ of habeas corpus in case No. E047930 with this appeal and will issue a separate order regarding the petition.

² *People v. Vickers* (1972) 8 Cal.3d 451 (*Vickers*).

³ All further statutory references are to the Penal Code unless otherwise indicated.

six-year term was also clearly referenced at the plea hearing and defendant expressed his understanding. However, there was no actual sentencing; the trial court explained, “I’m not going to sentence you now because I’m pressed for time. [¶] I’m going to release you on an OR.”

The matter came up for formal sentencing before the superior court on the next day, June 20, 2007. The minute order notes a waiver of formal arraignment, reflects a grant of probation, and lists numerous terms and conditions of probation. The minute order then notes defendant’s acceptance of the terms and condition and that “Defendant welcomed into Drug Court.” There is *no* mention of a term of imprisonment or any reference to the court’s intention in that respect. Unfortunately, the hearing was not reported.

After about a year, it was alleged that defendant had violated the terms of his probation as well as the terms of his drug court contract. This matter was initially dealt with on arraignment for the probation violations, and the minute order of May 16, 2008, indicates that defendant admitted violating two terms of probation—“maintain gainful employment” and “neither possess nor consume any alcoholic beverages” with Judge Brisco presiding. On May 21, in drug court, and again before Judge Brisco, defendant admitted “drinking and falsifying documents.”⁴

When the time came for formal proceedings on the revocation of probation, Judge Brisco again presided. The trial court first attempted to confirm that the six-year term

⁴ The documents, according to Judge Brisco, were “falsified paychecks to try to show the Court that he’s employed when in fact he’s not.”

had been imposed; appellant's counsel responded, "I believe it was." When questioned about his willingness to sentence defendant to other than the agreed term, he stated, "I'm not, because this is a contract he entered into. He knew what he was getting into."

After some discussion, Judge Brisco acknowledged having received defendant's admissions in drug court and noted, "I'm in fact a witness in your case; so the case will probably have to go to another court and I'll be called as a witness against you." Judge Brisco also referred to "the people in here that informed [him] of that"⁵ and indicated that he was "sure" that if called, they would confirm their information. He also referred to a "Miss Munson" (presumably defendant's probation officer) and gave the view that she "should come in here and testify about why he was terminated from Drug Court, and she can testify to all the admissions that he made to her." Finally, Judge Brisco referred to "another misdemeanor case in which he's charged with cruelty to a child and battery . . . [¶] . . . that's one alleged violation of his Drug Court Program."

After consulting with counsel, defendant requested a formal *Vickers* hearing on the violation of probation. Judge Brisco then indicated that because there would be other witnesses who could establish the charges, he would not transfer the case. Defendant's counsel asked Judge Brisco to recuse himself, but he declined.

Accordingly, the revocation hearing was scheduled for June 10, 2008, about two weeks later. However, on that date, after an unreported chambers discussion, defendant *waived the hearing* and admitted the charged violations. He was represented at this

⁵ That is, notified Judge Brisco in drug court of defendant's failures and misbehaviors and/or reported the issues as probation violations.

hearing by a different deputy public defender. The trial court (Judge Brisco) then terminated probation and stated, “[y]our previously imposed prison commitment of six years will now be imposed.”

Defendant duly filed a notice of appeal and sought a certificate of probable cause on a form through which he asserted grounds ranging from coercion of the plea to ineffective assistance of counsel to “dereliction of duty.” This was denied. Appointed counsel then filed with this court a “Motion to File Notice of Appeal Constructively Pursuant to *In re Benoit* (1973) 10 Cal.3d 72 . . .” in which it was sought to expand the grounds for appeal to include those raised here and to have the trial court compelled to issue a certificate of probable cause. (§ 1237.5.) After considering the motion and the People’s response, this court issued an order on April 3, 2009, noting that some of the issues sought to be raised appeared to fall outside the appellate record and, therefore, were more appropriately raised by a petition for writ of habeas corpus (which had in fact been filed on Mar. 20, 2009, case No. E047930). We also noted that the Attorney General had conceded that the issue of sentence error did not require a certificate of probable cause in any event. Accordingly, the motion was denied as moot or unnecessary.

DISCUSSION

The People’s sole response to defendant’s attack on his sentence is that the appeal must be dismissed because defendant failed to obtain a certificate of probable cause. We are compelled to look somewhat askance at this position, given that the People purported to concede that the issue did not require such a certificate, thus effectively short-

circuiting defendant's attempt to obtain one. Certainly, if we were to accept the People's argument in this respect, justice would require that we stop proceedings in order to give defendant another opportunity to obtain the required certificate.

However, viewing the matter in a narrow sense, we disagree that a certificate of probable cause is required before this court can consider the appeal. (See and cf. *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098.) Of course, it is true that a defendant cannot mount an attack on his guilty plea without a certificate of probable cause. (See, e.g., *People v. Kaanehe* (1977) 19 Cal.3d 1, 8 [inadequate warnings on limited right to appeal]; *People v. DeVaughn* (1977) 18 Cal.3d 889, 896 [plea induced by material misrepresentations]; *People v. Laudermilk* (1967) 67 Cal.2d 272, 282 [mental incompetence to enter plea].) It is also well established that an attack on the sentence imposed pursuant to a plea bargain normally requires a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 89 (*Panizzon*).)

However, it is also clear that appellate challenges to *postplea* proceedings generally *do not* require a certificate of probable cause. (*People v. Jones* (1995) 10 Cal.4th 1102, 1106, disapproved on other grounds by *In re Chavez* (2003) 30 Cal.4th 643, 656.) In this case, defendant is not precisely challenging the six years as intrinsically improper, unjustified, or illegal—which would fall under *Panizzon*—but is rather challenging the postplea procedures through which the sentence was, or was not, imposed. To that extent, we think it falls outside the purview of section 1237.5.

On the merits, however, defendant's argument is somewhat puzzling (and does in fact come perilously close to a challenge to the sentence). We agree that if, as the record

indicates, the trial court did not actually pronounce a sentence of six years at the time of initial sentencing on June 20, 2007, there was no “imposed but suspended” term to “impose” a year later.

If a court does not impose sentence at the time probation is granted it must do so when probation is terminated, and the defendant is entitled to the usual panoply of sentencing-hearing rights. (See *In re Levi* (1952) 39 Cal.2d 41, 44-45.) Insofar as this was not afforded defendant in this case, at the very least, the issue was waived.

Application of the waiver rule is appropriate where the error could have been readily cured or prevented had it been brought to the trial court’s attention. (See *In re Seaton* (2004) 34 Cal.4th 193, 198.) Defendant made no objection to the procedure followed and in fact encouraged the trial court to act as it did by concurring that sentence had already been imposed.

As defendant concedes, “claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) However, defendant argues that he is entitled to attack the sentence as “unauthorized.” It is true that an “unauthorized” term may be challenged at any time despite the lack of an objection at trial. (*People v. Valdez* (1994) 24 Cal.App.4th 1194, 1198-1200.) But an “unauthorized” sentence is generally one that could not lawfully have been imposed in any case. (*Scott, supra*, at p. 354.) Obviously, that is not the case here. The fact that the court attempted to “unsuspend” a term that had not actually been imposed is, in the

context of this case, simply a procedural mishap of no significance. The sentence was perfectly legal, not unauthorized, and any procedural error was waived.

Although defendant also argues that the trial court “completely failed to exercise its discretion,” and that this was a denial of a fair hearing (see *People v. Downey* (2000) 82 Cal.App.4th 899, 912), this is simply not true. Given the terms of the plea agreement, there was precious little discretion for the trial court to exercise. Judge Brisco also clearly indicated that he had no inclination to give defendant a better deal than he had bargained for, implicitly exercising any discretion unfavorably to defendant.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

MILLER
J.